

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1322

UNITED STATES COURT OF APPEALS

For The
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

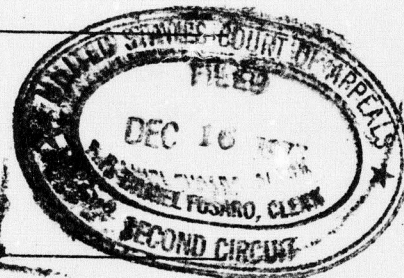
v.

MICHAEL SILBERBERG and
MORDECAI SILBERBERG,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANTS
MICHAEL SILBERBERG and
MORDECAI SILBERBERG



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-----X

UNITED STATES OF AMERICA,

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-against-

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REPLY BRIEF FOR APPELLANTS
MICHAEL SILBERBERG and
MORDECAI SILBERBERG

The Government's analysis is flawed. We address
Mordecai first, then Michael, then some general points.

POINT I

TESTIMONY OF THE GOVERNMENT'S
WITNESSES ESTABLISHES MORDECAI'S
RIGHT TO SUPPRESS. THE GOVERNMENT
MAY NOT NOW REPUDIATE THAT TESTIMONY.

The Government's major effort as to Mordecai is
to make the point that fear for his life was not the reason
he cooperated (Government Brief, "G. Br." 22); and for that
the Government relies on Mordecai's hearing statements.

Quite a turnabout. The Assistant's May 19, 1977
affidavit opposing Mordecai's motion to suppress (excerpts
attached) urged that Mordecai began to waiver when he learned

from his friend Lefkowitz that hoodlums were indeed looking for him (Defendant's Brief, "D. Br." 7, 18); and he finally gave in when Moody told him he either cooperated or went on the streets. The Assistant told us:

Mordecai drove to Brooklyn and met Lefkowitz, who told him that several unfamiliar men had come looking for him. One of the men stated to Lefkowitz, "once we find him, no one else will." After Lefkowitz told him this Mordecai returned to the car where the Agents, Merrill S. Parks, Jr., and Walter F. Smith, were waiting. He was visibly shaken, and told them that they had been right all along and he was ready to give them whatever assistance they wanted. The brothers were again lodged in a hotel for the evening.

* * * *

Mordecai's second option, Moody explained, was to refuse to cooperate and resume his normal activities. His third option was to refuse to cooperate and leave New York. Shortly thereafter, Mordecai signed the waiver form and agreed to speak to the agents.

The testimony of the Government's witnesses, on hearing, Agents Parks and Moody, was the same (A 60-61, 63-64, 74-75). The Assistant pressed Mordecai on cross that it was the way things happened (H 242-43, 246). And we adopted that very position and testimony for purposes of our argument.

Faced now with the prospect that it must lose on the facts as it presented them, the Government abandon those facts and, using selected excerpts from Mordecai's testimony taken

out of context, argues that the Agents' conduct had no effect (G. Br. 22).

This is nonsense. Mordecai made quite clear that although he thought he could talk his way out of whatever threats had been made, the agents kept hammering that they thought the opposite (Moody: "You either cooperate with us or you go out on the streets and you get killed" [H 230]), and finally he accepted that:

"When Agent Moody or one of the other agents... told me that they had definite information that there was a threat on my life, what was I to do? That was when I more or less agreed to it" (H 268).

Moreover, the Agents threatened that if Mordecai did not cooperate, Michael would go to jail. The F.B.I. "would make sure that wherever he went to jail, they would know that he was working for the F.B.I.", insuring Michael's death (H 233). See also H 253: Moody told Mordecai "that the F.B.I. was going to see that your brother was killed in jail". Thus, if Mordecai cooperated to help his brother, as the Government now urges (G. Br. 22***), that reason as well was induced by blatantly coercive threats.

In short, the facts in our main brief assumed the crediting of the Governments' witnesses. According to their testimony even if the threats on Mordecai's life did not emanate from them, they offered protection from those threats only in

return for a confession, and they got it. The confession therefore was coerced (D. Br. 16). Mordecai's testimony, read in its entirety supports and re-enforces that conclusion. To the extent that it is inconsistent with it, it is not available to the Government here. Since the district court denied Mordecai's motion, it must be taken that it "adopt[ed] the testimony of the Government witnesses on this point" (G. Br. 14), discussing Michael's case. That forecloses the Government now (G. Br. 13).

POINT II

NELSON'S STATEMENTS TO
MICHAEL PROMISED THAT THERE
WOULD BE NO PROSECUTION IF
HE COOPERATED. THAT IS
SUFFICIENT TO MAKE OUT THE
CASE FOR SUPPRESSION.

The Government plays games with the facts as to Michael. We did not devise the Agents' statements to Michael. They did. Their testimony is that they told Michael (D. Br. 12): "that he had a choice... tell us what he had been doing and assisting us or... we would go to the United States Attorney... and take through the attorney legal action against him." What can this possibly mean except that if Michael cooperated he would not be prosecuted, and if he didn't, he would be? In this context, it is silly for the Government to argue (G. Br. 14-15), that no promise was made because the Agents did not say in haec verba "we will not prosecute", or "we will not use your

statements", or "we will give you immunity". What matters here is not what the Agents didn't say (D. Br. 13), but the specific implication of what they did say: with cooperation, no prosecution; without it, legal action from the U.S. Attorney; the "choice" is yours.

Several other distortions deserve comment.

First, the Government makes much of the fact that the earlier Miranda warnings advised Michael that his statements could be used against him (G. Br. 12-13). But the Agents said immediately after that, that there would be no prosecution. That left little to the warnings.

Second, the Government cites Cole's testimony that Michael was told the F.B.I. would prosecute immediately (G. Br. 15). Since Moody, not Coles was the principal agent (H 172-73), Moody's more precise recollection would be more reliable if there was a contradiction. However, there is none.

Coles full statement, read in context (H 177), is merely a quotation of Nelson to the effect that if Michael did not cooperate "we were going to go ahead with prosecution of him immediately." That is all Coles meant to say.

Third, the Government argues that Michael did not cooperate (G. Br. 16*) so it was free to break its promise not to prosecute. Yet after reciting all that Michael did (G. Br. 8), it ends up telling us that Michael "was [still] scheduled to surrender to begin service of his prison sentence in the

Eastern District" (G. Br. 9) in October, 1975. This tells a lot about who broke what promises to whom. Michael fled the bargain (G. Br. 16) only because the Government first reneged by sending him to jail under the Eastern District sentence (D. Br. 14-15), the avoidance of which was the main reason he had been cooperating in the first place.

Finally, there is no merit to the Government's suggestion that Michael has raised a new twist on appeal. In the first place, the "no prosecution" issue is only another way of saying that Michael had confessed in the belief that he would suffer no untoward consequences from his confession. Whether it came about through his belief that he received a promise not to prosecute or a promise not to use his statements came to the same thing for purposes of the suppression hearing. The Assistant, moreover, clearly posed the "no prosecution" issue when he recited in his May 16, 1977 affidavit opposing the motion (excerpt attached):

Zilberberg was then fully advised of his constitutional rights and told that anything he said to the F.B.I. thereafter could be used against him. He was also told that he could not be promised that he would not be prosecuted if he made incriminating statements.

And since the hearing went on at length about that promise, that totally ends the matter.

POINT III

THE INTERSTATE TRANSPORTATION
MUST BE REASONABLY FORESEEABLE
TO ESTABLISH A VIOLATION OF
SECTION 2314.

We shall not dwell on the Government's arguments on this point (G. Br. 27-29) except to say (a) that United States v. Scandifia, 390 F.2d 244 (2d Cir. 1968) and United States v. DeKunchak, 467 F.2d 432 (2d Cir. 1972) specifically hold with reference to 18 U.S.C. 2314 (not the criminal statutes with which most of the Government's cases are concerned) that the interstate transportation must have intended, known, or reasonably foreseen and that to pass counterfeit checks without a limitation on the purchaser does not make out that element; (b) that those decisions have not been overruled; (c) that if they are the law then the conspiracy count as well would fall, notwithstanding United States v. Feola, 420 U.S. 671 (1975); and (d) that the issue is open to Mordecai as well (G. Br. 25) because Judge Metzner made clear he would use the same charge in Mordecai's case as in Michael's and the issue had been fully thrashed out there adversely to defendants.

Respectfully submitted,

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Although Mordecai was not the subject of any pending indictment during 1975, he had been convicted in a state court in Pennsylvania in 1969 of fraudulent conversion of an automobile.

3. On September 16, 1975 Mordecai met two agents, Jim E. Moody and Ford Cole, at an apartment near 76th Street and First Avenue in Manhattan. Mordecai had previously been called by his brother, who arranged the meeting at the behest of the agents. At this meeting, the agents told Mordecai that they believed that his life was in danger, having been told by several informants that certain people intended to kidnap him and kill him. The agents also requested Mordecai's cooperation in various investigations then underway. Mordecai told the agents that he refused to believe that he was in any danger whatever. He further stated that he had no interest in helping the F.B.I. and thereupon left the apartment.

4. On the afternoon of September 17, 1975, Michael Zilberberg was discovered wearing a recording device by several criminal associates. He was released unharmed and accompanied the agents surveilling him back to the F.B.I. office on East 69th Street in Manhattan. After they arrived, a call was placed to Mordecai summoning him to the F.B.I. office. When he arrived, he was told what had happened and was advised that he was probably in even more danger than before. The agents suggested that the brothers spend the night in a midtown hotel. Both agreed to this suggestion and they were lodged at a hotel not far from the F.B.I. office. During that conversation, Mordecai's cooperation was again solicited and he again refused. That evening, agents went out, purchased kosher food,

and brought it to the Zilberberg's hotel room. The Zilberbergs spent the evening at the hotel; they were not, however, guarded by agents once in the hotel.

5. On September 18, 1975, Mordecai, who continued to insist that he was in no danger, stated that he wished to drive his car back to Brooklyn and leave it with a friend, Martin Lefkowitz. It was suggested that he permit himself to be accompanied by two agents for his protection, and he agreed. Mordecai drove to Brooklyn and met Lefkowitz, who told him that several unfamiliar men had come looking for him. One of the men stated to Lefkowitz, "once we find him, no one else will." After Lefkowitz told him this Mordecai returned to the car where the agents, Merrill S. Parks, Jr. and Walter F. Smith, were waiting. He was visibly shaken, and told them that they had been right all along and he was ready to give them whatever assistance they wanted. The brothers were again lodged in a hotel for the evening.

6. On the morning of September 19, 1975, Agents Smith and Parks went to the Zilberbergs' hotel room to begin their interviewing of Mordecai. At that time, Mordecai refused to talk, and Agent Moody was summoned to speak to him. Moody asked Mordecai to sign a waiver of rights form, which he had previously refused to do. Moody told Mordecai that signing the form was essential because it was necessary for Mordecai to acknowledge both that he would be incriminating himself and that the statements might be later used against

him. Moody never told Mordecai that signing the form was a "formality."* Moody told Mordecai that he had three options available to him. First, he could agree to talk to the agents, with the realization that his statements could be used against him. If he did agree to assist the F.B.I., he would be considered for the Department of Justice's Witness Protection Program. Moody told Mordecai that, as the name implied, the program was only for the protection of those who had agreed to testify for the Government. Mordecai's second option, Moody explained, was to refuse to cooperate and resume his normal activities.** His third option was to refuse to cooperate and leave New York. Shortly thereafter, Mordecai signed the waiver form and agreed to speak to the agents.

7. After Mordecai agreed to speak to the agents, he was interviewed that same morning, September 19, by Smith and Parks. He provided information about various criminal activities in which he had engaged, and most of his remarks concerned hijackings in the New York area from which he had obtained merchandise. On September 19, Mordecai did not discuss the transaction concerning the counterfeit Bankers' Trust Company checks that is the subject of this indictment.

* Mordecai does recall correctly in his affidavit (45) that Moody told him that Michael had previously signed such a form. He also correctly asserts that Michael never signed such a form. He is incorrect, however, in his contention that Moody was lying to him. At the time he spoke to Mordecai, Moody was under the mistaken impression that Michael had signed a form, and he will so testify. Moody's error here, however, was more one of form than of substance, for Michael had already been fully advised of his rights and had knowingly waived those rights in agreeing to speak to the agents. His waiver had thus been oral rather than in writing.

** See footnote on next page.

Zilberberg mentioned on one occasion that he had met Crutch, he never told any F.B.I. agent that he was engaged in passing Crutch's checks. Zilberberg had also never told the F.B.I. that he was in possession of checks stolen from the National Bank of North America, some of which he had given to Crutch.

9. On September 2, 1975, various F.B.I. agents met Michael Zilberberg at a restaurant near F.B.I. headquarters on East 69th Street in Manhattan. Zilberberg was informed by the agents that they knew that he had attempted to pass counterfeit Bankers Trust Company checks. Zilberberg was then fully advised of his constitutional rights and told that anything he said to the F.B.I. thereafter could be used against him. He was also told that he could not be promised that he would not be prosecuted if he made incriminating statements.

10. Zilberberg stated that he was aware of his rights and that he nevertheless wished to cooperate with the F.B.I. During the next few weeks, he gave to the F.B.I. a detailed account of the criminal activities in which he had been engaged in the past two years; this account was far more extensive than the information he had supplied while a paid informant. Zilberberg also agreed to meet with various individuals with whom he had dealt and to tape record these conversations for the F.B.I.

11. On September 17, 1975, Zilberberg was discovered wearing a tape recorder by two of his criminal associates, but was released unharmed. He thereafter asked to be placed in the

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CERTIFICATE OF SERVICE

I certify that on December 13, 1977 I had mailed to Robert Fiske, Esq., One St. Andrews Plaza, New York, New York 10007, one copy of the Reply Brief for Appellants, MICHAEL SILBERBERG and MORDECAI SILBERBERG.

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